

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

THE STATE OF MICHIGAN,
GOVERNOR OF THE STATE OF
MICHIGAN, and MICHIGAN
DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v.

ENBRIDGE ENERGY, LIMITED
PARTNERSHIP, ENBRIDGE ENERGY
COMPANY, INC., and ENBRIDGE
ENERGY PARTNERS, L.P,

Defendants.

Case No. 1:20-cv-01142-JTN-RSK

Hon. Janet T. Neff

**DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF BASED ON CANADA'S INVOCATION OF 1977 TRANSIT TREATY**

Pursuant to L. Civ. R. 7.2(c), Defendants respectfully move for leave to file a Supplemental Brief in Opposition to Plaintiffs' Motion to Remand (ECF No. 47). The proposed Supplemental Brief is attached hereto as Exhibit A.

Defendants seek to include in the record a new and important development. On October 4, 2021, the Government of Canada formally invoked the dispute resolution provisions of Article IX of the 1977 Transit Treaty with the United States. *See* Statement by Canadian Foreign Minister Garneau on Line 5 transit pipeline (attached hereto as Exhibit B). This new development supports Defendants' argument that this case was properly removed to federal court. Because the new development occurred only recently, it could not have been included in the prior briefing on the motion for remand.¹ Accordingly, Defendants respectfully request leave to file a short

¹ The briefing on the motion for remand was completed on June 2, 2021.

Supplemental Brief, explaining how this important development further supports this Court's exercise of original jurisdiction.

Defendants had previously filed a motion for leave to file a supplemental brief to bring new developments to the Court's attention. (ECF No. 55). Plaintiffs opposed that motion, arguing that the information cited by Enbridge was not "new" or "material." (ECF No. 58, PageID.880-81.) In the State's words, "there is nothing remarkable, legally, or otherwise, about officials for two countries communicating on a topic of shared interest such as Line 5." (*Id.* at p. 2, PageID.881.) Michigan insisted that there is no evidence the Treaty has been formally invoked: "While there have apparently been communications between officials of each government, there is no evidence that negotiations under the Treaty itself are in progress." Reply in Support of Remand (ECF No. 51) at PageID.852. Now that the dispute resolution provisions of the Treaty have been formally invoked—resulting in more formal diplomatic negotiations and potentially an international arbitration concerning Michigan's unilateral efforts to force closure of Line 5—this development should be made part of the record and the Court's consideration in deciding the motion for remand.

This Court has granted leave, pursuant to Local Rule 7.2(c), in other cases to file supplemental briefs that address intervening developments pertinent to a pending motion. *See George v. Lochenheath Properties, LLC*, No. 07-cv-426, ECF No. 42 (W.D. Mich. Apr. 29, 2008) (Neff, J.); *Allstate Ins. Co. v. Nowakowski*, No. 11-cv-809, ECF No. 23 (W.D. Mich. Mar. 2, 2012) (Neff, J.). Others courts have similarly allowed parties to supplement briefs to address new developments relevant to a motion for remand pending before the court. *See, e.g., Stringer v. Conagra Foods, Inc.*, No. 07-12028, ECF No. 9 (E.D. Mich. Aug. 9, 2007) (submitting supplemental brief to address intervening legal developments supporting defendant's opposition to a motion for remand); *Firefighters' Retirement System v. Citco Group Limited*, No. 13-cv-373,

ECF Nos. 195, 196 (M.D. La. Feb. 11, 2014) (order granting motion for leave to file supplemental brief to address recent developments relevant to the court's removal jurisdiction).²

Plaintiffs will not be prejudiced by the granting of this motion. However, Defendants will be prejudiced if this development is not permitted into the record for the Court's consideration prior to rendering any decision on the motion for remand.

As required by Local Rule 7.1(d), Defendants conferred with plaintiffs regarding this motion for leave. Counsel for Plaintiffs stated that his clients oppose this motion.

WHEREFORE, for these reasons and those set forth in the proposed Supplemental Brief, Defendants respectfully request that the Court enter an order granting this Motion for Leave to file the Supplemental Brief.

Dated this October 21st, 2021

Respectfully submitted,

s/ Peter H. Ellsworth
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² See also *Barondes v. Wolfe*, No. 15-4230, ECF No. 18 (W.D. Mo. Dec. 21, 2015) (filing supplemental brief to address recent factual developments relevant to motion for remand); *Slaughter v. Uponor*, No. 08-cv-1223, ECF No. 88 (D. Nev. Feb. 4, 2009) (submitting supplemental opposition to motion for remand); *Farina v. Nokia*, No. 06-0724, ECF No. 88 (E.D. Pa. Jan. 31, 2008) (same); *Kaufman v. CVS Caremark Corp.*, No. 14-cv-216, ECF No. 18 (D. R.I. Oct. 15, 2015) (text order granting leave to file supplemental brief to address intervening developments relevant to the pending motion); *In re Boeing Co.*, No. 95-375, ECF Nos. 621, 622 (S.D. Ohio Mar. 31, 2000) (order granting motion for supplement to address recent factual developments).

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2021, the foregoing motion was served on all parties of record via the ECF filing system.

s/ Peter H. Ellsworth
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